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No. 88-559

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH AZAR, PETITIONER

v.

MINISTER OF LEGAL AFFAIRS,
GOVERNMENT OF TRINIDAD AND TOBAGO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction under Article III to issue a subpoena, pursuant to 28 U.S.C. 1782, upon the application of a foreign government for judicial assistance.

2. Whether 28 U.S.C. 1782(a), which provides for the production of evidence "for use in a proceeding in a foreign or international tribunal," is available only when the foreign proceeding is pending at the time when the evidence is sought.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 848 F.2d 1151. The opinion of the district court denying petitioner's motion to quash a subpoena issued upon respondent's application (Pet. App. 13a-19a) is reported at 648 F. Supp. 464. The opinion of the district court denying petitioner's motion for relief from judgment (Pet. App. 20a-26a) is reported at 117 F.R.D. 177.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1988. A petition for rehearing was denied on August 26, 1988. The petition for a writ of certiorari was filed on September 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 1782(a) of Title 28 of the United States Code provides in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. * * * To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

STATEMENT

1. In a request dated December 31, 1985, the Attorney General and Minister of Legal Affairs of the Republic of Trinidad and Tobago (hereinafter 'Trinidad') sought judicial assistance in obtaining records relating to petitioner's bank accounts in the Union Bank of Florida. The request stated that law enforcement authorities in Trinidad were investigating possible violations of that nation's criminal statutes—specifically, violations of Trinidad's currency control laws. Records relating to petitioner's bank accounts were sought, according to the request, to show that funds had been transferred from Trinidad and to identify the ultimate beneficiaries of the scheme. Pet. App. 2a, 13a; C.A. Record 1 (December 31, 1985, letter from the Attorney General and Minister of Legal Affairs of Trinidad to Attorney General Edwin Meese III seeking

Mutual Legal Assistance (hereinafter "Request for Assistance")).

The request stated that those records "are evidence needed for use in a judicial proceeding to be held in Trinidad" (Request for Assistance at 5). Accordingly, the request described the foundational requirements under the law of Trinidad for the admission of business records, and it asked that responsive documents be accompanied by a "certificate of authenticity" sufficient to establish their admissibility (*id.* at 6). The request also proposed that bank officials be asked whether they would be willing to travel to Trinidad at the expense of the Trinidad government to authenticate the records at trial (*ibid.*).

The Department of Justice, acting on behalf of Trinidad, made an application to the United States District Court for the Southern District of Florida for an order to implement the request. In an order dated July 11, 1986, the district court authorized the issuance of a subpoena to the Union Bank "for the purpose of obtaining the requested documents, as well as proof of their authenticity." Petitioner subsequently moved to quash the subpoena.

2. The district court denied the motion to quash (Pet. App. 13a-19a). The court first rejected petitioner's claim that Section 1782 requires that a request for judicial assistance be made by a foreign tribunal in the form of letters rogatory. The court explained that the statute permits judicial assistance "upon the application of any interested person," and that the Minister of Legal Affairs, "a foreign official who possesses a reasonable interest in obtaining assistance," satisfied that requirement (Pet. App. 15a-16a).

The district court also rejected petitioner's contention that Section 1782 permits assistance only when legal proceedings are "pending" in a foreign state. The court noted

that the request for assistance "[made] absolutely clear that the purpose of the documents requested is for use at trial" (Pet. App. 16a). Accordingly, the court concluded that the documents were sought "for use in a proceeding in a foreign tribunal" within the meaning of Section 1782 (Pet. App. 18a). Based upon its review of the statute's legislative history, the court held that Section 1782 does not require that a foreign proceeding be pending at the time of the request, as long as the evidence sought in the request "will eventually be used" in such a proceeding (Pet. App. 18a).[1]

3. The court of appeals affirmed (Pet. App. 1a-12a). After tracing the statute back to its origins, the court held that Section 1782(a) does not require that a proceeding be pending in the requesting country in order for a federal court to grant judicial assistance (*id.* at 8a-9a). The court of appeals noted that in 1964 Congress had broadened the statute in several respects in order to "improve practices of international cooperation in litigation" (*id.* at 5a). Specifically, Congress dropped the word "pending" from Section 1782(a), replacing the requirement that the evidence requested be for use in "any judicial proceeding *pending* in any court in a foreign country" with the requirement that the evidence be for use "in a proceeding in a foreign or international tribunal" (Pet. App. 6a (emphasis in original)). Citing the general rule that such a change "generally indicates an intent to change the meaning of the statute," the

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[1] The district court subsequently denied petitioner's motion for relief from the judgment, declining to decide whether the law of Trinidad would permit similar discovery in that country. The court held that, in view of the purposes of Section 1782 and in the absence of any violation of due process, the subpoena's enforceability was not dependent on issues of foreign law, and that any issues of admissibility should be left to the courts of Trinidad (Pet. App. 20a-26a). The petition does not raise the issues resolved in that opinion.

court of appeals concluded that "a pending proceeding is not absolutely necessary" for purposes of Section 1782 (Pet. App. 8a).

The court of appeals also held that the district court did not abuse its discretion when it granted judicial assistance in this case (Pet. App. 9a-11a). The court of appeals explained that the district court had properly characterized Trinidad's Minister of Legal Affairs as an "interested person" for purposes of Section 1782 and that, in view of the request's suggestion that a trial was imminent and petitioner's failure to provide any evidence demonstrating that the records were sought for some other purpose, the district court "could reasonably conclude that the records would be used in a criminal trial" (Pet. App. 10a). Finally, the court of appeals held that the bank records were discoverable under the law of Trinidad (*id.* at 11a).

In a petition for rehearing, petitioner argued for the first time that the district court lacked jurisdiction under Article III to entertain a request for judicial assistance pursuant to Section 1782. The court of appeals denied the petition for rehearing without issuing an opinion.

ARGUMENT

1. Petitioner's principal contention is that the district court lacked jurisdiction under Article III to issue a subpoena upon the application of the Minister of Legal Affairs (Pet. 5-10). This claim was not raised below except in petitioner's request for rehearing in the court of appeals, and it is without merit in any event.

It is well established that federal courts have inherent authority to issue letters rogatory in aid of their proceedings and to compel the production of evidence in aid of foreign proceedings. *In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada,* 523 F.2d 562,

564 (6th Cir. 1975); *United States* v. *Reagan,* 453 F.2d 165, 173 (6th Cir.), cert. denied, 406 U.S. 946 (1971); *United States* v. *Staples,* 256 F.2d 290, 292-293 (9th Cir. 1958); *In re Pacific Ry. Comm'n,* 32 F. 241, 256-257 (C.C.N.D. Cal. 1887). Section 1782 codifies and regulates the latter power. *In re Letter Rogatory From the Justice Court, Dist. of Montreal, Canada,* 523 F.2d at 564. A request for assistance is therefore a proceeding "arising under" Section 1782 for purposes of Article III. See Pet. 8.

The procedure for the execution of requests for assistance under Section 1782 is closely analogous to that followed with respect to grand jury subpoenas. See *United States* v. *Reagan,* 453 F.2d at 173; *In re Pacific Ry. Comm'n,* 32 F. at 256-257. The undoubted authority of federal courts to issue and enforce grand jury subpoenas forecloses petitioner's contention that the district court exceeded the "judicial Power" when, in accordance with Section 1782, it issued a subpoena without prior notice to petitioner or his bank to obtain evidence other than for a case pending in the United States.

Like grand jury subpoenas, letters rogatory and subpoenas to execute them are traditionally issued without advance notice to those from whom evidence may be sought and other interested persons. See *In re Letters Rogatory From the Tokyo Dist., Tokyo, Japan,* 539 F.2d 1216, 1219 (9th Cir. 1986). For purposes relevant here, these routine judicial acts are indistinguishable from the issuance of federal grand jury subpoenas, which are provided in blank to federal prosecutors. *In re Grand Jury Matters,* 751 F.2d 13, 16 (1st Cir. 1984). In either context, the subpoena serves as a notice that evidence is being sought, and it triggers a right, in parties that have standing, to challenge the subpoena by means of a motion to quash. This procedure assures that questions regarding the enforceability of a subpoena will be heard, as they were in this case, in the

manner required by Article III. See *Hale* v. *Henkel,* 201 U.S. 43, 80 (1906) (McKenna, J., concurring). There is no constitutional requirement that the *issuance* of a subpoena be preceded by adversary proceedings.

Similarly, Article III does not limit the issuance of subpoenas to situations in which a "case or controversy" is pending in a federal court. Grand jury subpoenas are issued under the authority of the federal courts in aid of investigations that precede the commencement of a criminal case against any defendant. It is not even necessary that the grand jury be sitting at the time a subpoena is issued. *United States* v. *Morton Salt Co.,* 216 F. Supp. 250, 257 (D. Minn. 1962), aff'd per curiam, 382 U.S. 44 (1965). See *United States* v. *Miller,* 425 U.S. 435, 438 (1976); *United States* v. *Stevens,* 510 F.2d 1101, 1106 (5th Cir. 1975). Accordingly, there is no merit to petitioner's claim that the district court lacked constitutional authority to issue a subpoena in aid of an imminent criminal proceeding in Trinidad. See *In re Letters Rogatory From the Tokyo Dist., Tokyo, Japan, supra* (affirming issuance of subpoena pursuant to a request from the Tokyo prosecutor's office in support of an investigation).[2]

2. Petitioner also contends that the court of appeals' decision unjustifiably broadens the rights of foreign parties to discovery and "undermine[s] the protections afforded by" the Right to Financial Privacy Act of 1978, 12 U.S.C. (& Supp.) 3401-3422. Pet. 11-12, 13. Both contentions are without merit.

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[2] Contrary to petitioner's contention (Pet. 9-10), this case presents no issue concerning the potential intrusion of a federal court into the conduct of American foreign policy. The government of the United States has appeared on behalf of the Minister of Legal Affairs of Trinidad to obtain enforcement of his request for assistance, and thus the Executive Branch has indicated its agreement that the request by Trinidad should be honored.

The court of appeals was correct in its conclusion that Section 1782 authorizes judicial assistance even in the absence of a pending foreign proceeding (Pet. App. 8a-9a). The language of the statute, which permits assistance "for use in a proceeding in a foreign or international tribunal," does not require that a foreign proceeding actually be underway at the time a court executes a request for assistance. As the court of appeals noted, when Congress amended Section 1782 in 1964, it deleted the word "pending" from the statute (Pet. App. 6a). One of the statute's principal drafters has also made clear his understanding that it is not "necessary * * * for the [foreign] proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding." Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 (1965). See *In re Letters Rogatory From the Tokyo Dist., Tokyo, Japan, supra.* Moreover, as the court of appeals stated, district courts can deny a request for assistance when no foreign proceeding is likely to be brought or when the request represents a " 'fishing expedition' or a vehicle for harassment" (Pet. App. 11a). Section 1782 therefore does not expose parties in this country to unreasonable burdens in the form of extravagant discovery demands.[3]

With respect to the Right to Financial Privacy Act, the court of appeals found that records relating to petitioner's bank accounts "will be released in conformance with" the Act (Pet. App. 11a n.12). Since petitioner learned of the subpoena served on his bank and had the opportunity to

[3] The court of appeals' decision does not put American companies at a relative disadvantage when litigating with foreign parties. The concerns expressed about that potential situation in *Societe Nationale Industrielle Aerospatiale* v. *United States District Court for the Southern District of Iowa*, No. 85-1695 (June 15, 1987), slip op. 16-17 n.25, have no applicability to this case.

file a motion to quash, he could not have been prejudiced by any failure to provide formal notice of the subpoena for records relating to his bank accounts. Thus, this case does not present the question whether the Right to Financial Privacy Act requires notice of an application for bank records when that application is under the authority of Section 1782. See 12 U.S.C. 3407(2). The Financial Right to Privacy Act does not prohibit subpoenas for bank records. To the contrary, it specifically provides that bank records are subject to judicial subpoena when "there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry" (12 U.S.C. 3407). Thus, the issuance and enforcement of a subpoena for bank records in this case involve no potential violation of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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